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Supreme Court, U.S.
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No. 96-1674

IN THE

Supreme Court of the United States

OCTOBER TERM 1996

THOMAS J. BYRNES
AND
RICHARD C. OTTO,

Petitioners,

v.

LCI COMMUNICATIONS HOLDINGS CO.,
LCI COMMUNICATIONS, INC.,
LITEL COMMUNICATIONS CORPORATION,
LITEL TELECOMMUNICATIONS CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the Ohio Supreme Court

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Supreme Court has jurisdiction over a state court's application of state statutes, when no federal constitutional or statutory claim or defense is raised, merely because the state's employment discrimination law was developed in part by looking to the analogous federal *McDonnell-Douglas v. Green* model for guidance.

2. Whether the Seventh Amendment applies to state court review of state court trials.

PARTIES TO THE PROCEEDINGS

Petitioners in this case are Thomas J. Byrnes and Richard C. Otto. Petitioners have listed as Respondents four corporate entities: (1) LCI Communications Holdings Co., now known as LCI International, Inc.; (2) LCI Communications, Inc., now known as LCI International Management Services, Inc.; (3) Litel Communications Corporation, and (4) Litel Telecommunications Corporation, now known as LCI International Telecom Corp. With the exception of Litel Communications Corporation, which to the best knowledge of the remaining Respondents has never existed, the remaining corporate entities are affiliated companies and Respondents in this action. For convenience, future references to the three corporate Respondents shall be collective, using the singular "Respondent" or "LCI."

Pursuant to Supreme Court Rule 29.6, the court is advised that Respondent LCI International Inc. (formerly known as LCI Communications Holdings, Co.) is the corporate parent of the remaining Respondents, and that Respondents have no nonwholly owned subsidiaries.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

STATEMENT OF THE CASE

Petitioners, two former employees of Respondent LCI Communication Holdings Co. ("LCI"), filed state law claims alleging that their employment was terminated because of their ages, in violation of Ohio Rev. Code § 4112.02(N). Petitioners did not file any federal causes of action, nor invoke any federal laws. LCI did not raise any federally-based defense. After a jury verdict in Petitioners' favor was affirmed by an intermediate appellate court, the Ohio Supreme Court reversed the verdict and granted judgment in favor of LCI. (Pet. App. at A-1.)

The Ohio Supreme Court found that the evidence adduced by Petitioners was legally insufficient to support a verdict of age discrimination under Ohio Rev. Code § 4112.02(N). (Pet App. at A-7.) The plurality opinion explained (Pet. App. at A-9) that, under the Ohio Supreme Court's prior decision in *Barker v. Scovill, Inc.*, 6 Ohio St. 2d 146, 451 N.E.2d 807 (1983), discriminatory intent could be established indirectly under a four-part analysis, which *Barker* developed by looking for guidance to this Court's decision in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). The plurality also noted (Pet. App. at A-8) that, under Ohio law, discriminatory intent may also be established by "direct evidence of age discrimination, which is evidence other than the four-part demonstration of *Barker*." Noting that Petitioners "concede[d] that they do not meet the four-part *Barker* analysis" (Pet. App. at A-9-10), the plurality proceeded to apply Ohio's standards for proving discrimination through "direct evidence." These standards, as the plurality explained (Pet. App. at A-9-10), were developed in two earlier Ohio Supreme Court decisions, *Mauzy v. Kelly Services, Inc.*, 75 Ohio St. 3d 578, 664 N.E. 2d 1272 (1996), and *Kohmescher v. Kroger Co.*, 61 Ohio St. 3d 501, 575 N.E.2d 439 (1991). Specifically, the plurality held that, because Petitioners had shown no causal link or nexus between certain statements and their terminations, the proof was insufficient to meet the "direct

evidence" standard established in *Mauzy* and *Kohmescher*. Justices Douglas and Sweeney concurred in the judgment in a brief opinion that cited only the *Mauzy* and *Barker* cases. This petition followed.

REASONS FOR DENYING THE WRIT

Petitioners filed state claims in a state case in a state court, and they cannot now make a federal case. Because petitioners do not, and can not, establish any conceivable federal question, this Court has no jurisdiction and should not grant certiorari. In all events, even overlooking the petition's jurisdictional defect, the question that it seeks to present is simply a factbound application of well-established law. Finally, Petitioners' Seventh Amendment claim is frivolous. Under well-settled decisions of this Court, the Seventh Amendment provision that Petitioners seek to invoke does not apply in state court.

I. NO FEDERAL JURISDICTION EXISTS WHERE THE OHIO SUPREME COURT APPLIED STATE LAW TO A STATE CLAIM AND MERELY LOOKED TO ANALOGOUS FEDERAL LAW FOR GUIDANCE

Under Article III of the United States Constitution and 28 U.S.C. § 1257, this Court has "no authority to review state determinations of purely state law." *International Longshoremen's Association v. Davis*, 476 U.S. 380, 387 (1986). Here, the Ohio Supreme Court construed and applied only Ohio Rev. Code 4112.02(N), and the judgment turned on the proper application of standards developed in two Ohio cases, *Mauzy* and *Kohmescher*. Thus, this case plainly involves a question "of purely state law," *Davis*, 476 U.S. at 387, and certiorari accordingly should be denied.

Petitioners attempt to manufacture jurisdiction by citing the federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623 *et seq.*, and suggesting (Pet. at 5) that the Ohio Supreme Court was applying *McDonnell-Douglas*. But the simple fact is that no ADEA claim is involved here and that, at most, the

Ohio Supreme Court merely cited *McDonnell-Douglas* once, noting in passing that the earlier *Barker* decision had adopted a similar framework. (*See* Pet. App. at A-7.) Such a single, indirect citation to a broad framework such as *McDonnell-Douglas* cannot create a federal issue where none exists. *See e.g.*, *Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 550 n. 9 (1987) ("casual reference to a federal case" in appellate brief "is insufficient to . . . present [ ] . . . a claim subject to [this Court's] appellate jurisdiction under 28 U.S.C. 1257"); R. Stern, et al., *Supreme Court Practice* § 3.22, at 143 (7th ed. 1993) ("[R]eferences in the [state court] opinion to the federal question must be more than broad generalizations or federal citations if the independence or adequacy of the state ground is to be overcome.").

Nor does this case invoke the jurisdictional principles developed in *Michigan v. Long*, 463 U.S. 1032 (1983). Since this case involves only state claims under state statutes, there simply is no issue of federal law for the state court judgment to rest upon or be intertwined with. *Long* "applies *only* when it *fairly appears* that a state court judgment rested primarily on federal law . . . ." *Coleman v. Thompson*, 501 U.S. 722, 739-740 (1991) (emphasis added).

Finally, the so-called "*McDonnell-Douglas* issue" that Petitioners seek to present is in all events no legitimate basis for certiorari. As an initial matter, the Ohio Supreme Court's decision simply did not involve application of the four-part *McDonnell-Douglas* framework, which the Ohio Supreme Court had earlier adopted in its *Barker* decision, 6 Ohio St. 3d at 147. Rather, because Petitioners "concede[d] that they d[id] not meet the four-part *Barker* analysis" (Pet. App. at A-9-10), the decision below turned on an alternative method of proving discrimination developed by the Ohio Supreme Court in its decisions in *Mauzy*, 75 Ohio St. 3d at 587-88, and *Kohmescher*, 61 Ohio St. 3d at 504-06. Thus, there cannot conceivably be any application of *McDonnell-Douglas* to review.

Nevertheless, Petitioners now purport to object (Pet. at 5) to "the Ohio Supreme Court's restrictive misconstruction of" the *McDonnell-Douglas* framework. But Petitioners do not suggest (Pet. at 6) that any modification of the firmly-established *McDonnell-Douglas* framework is necessary. This leaves Petitioners complaining (Pet. at 6) only about the application of the *McDonnell-Douglas* framework to the particular facts of this case. Such a factbound "misconstruction" or misapplication does not merit this Court's review.

II. THE SEVENTH AMENDMENT DOES NOT APPLY TO STATE COURT APPELLATE REVIEW OF STATE COURT TRIALS

It is settled law that the Seventh Amendment only governs proceedings in federal courts, and has no application to state court proceedings. *See, e.g., Gasperini v. Center for Humanities*, 518 U.S. __, __ (1996); *Curtis v. Loether*, 415 U.S. 189, 192 n. 6 (1974); *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211, 222 (1916). Accordingly, Petitioners' second question presented is frivolous and is no proper basis for certiorari.

In attempting to argue that the Seventh Amendment *does* apply in state court cases, Petitioners cite and misconstrue this Court's prior decisions. Specifically, Petitioners cite *Chicago, B. and Q. Ry. Co. v. Chicago*, 166 U.S. 226, 242-43 (1896), and *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 n. 26 (1964), suggesting that these decisions support application of Seventh Amendment constraints to the Ohio Supreme Court's review in this case. But, in fact, these decisions do not involve application of the Seventh Amendment to appellate review by *state* courts, but instead involve application of the Seventh Amendment to *this* Court's review in cases coming from the state courts. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. at 285 n. 26. These decisions thus all are consistent with the principle that the Seventh Amendment has no application in state court.

In any event, even if the Seventh Amendment did apply, the question that Petitioners seek to present would not be worthy of certiorari. The standards of the Reexamination Clause are well-

settled, and nothing about a particular, factbound application of those standards warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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